

R.D. # 0001-05
Moonachie, N.J.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

V.L.P.S. LIGHTING SERVICES

Employer

and

CASE 22-RC-12557

**INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES
AND MOVING PICTURE MACHINE
OPERATORS OF THE UNITED STATES
AND CANADA, LOCAL 632¹**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The Petitioner seeks to represent a unit of about 14 employees employed by the Employer in the Shop, Technical Services and Event Staff departments of its Moonachie, New Jersey facility.² The Employer contends the largest appropriate unit consists of four shop technicians because the employees in the Shop department do not share a community of interest with employees in the other two departments and

¹ The name of the Petitioner appears as amended at the hearing.

² The Shop consists of four shop technicians, one lead technician and a shop foreman or supervisor. Technical Services consists of two technical services or field technicians and one technical services supervisor. The Event Staff consists of five employees who work as programmers and/or technicians.

because the Shop Foreman, the Lead Shop Technician, the Technical Services Supervisor and the entire Event Staff are supervisors as defined by the Act. There is no history of collective bargaining for any of the employees involved here. I find, for the reasons described below, that the petitioned for unit is appropriate and I shall order an election therein.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.⁴
3. The labor organization involved claims to represent certain employees of the Employer.⁵
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

³ Briefs filed by the parties have been considered.

⁴ The Employer is a Delaware corporation engaged in the provision of theatrical lighting services at its Moonachie, New Jersey facility, the only facility involved herein.

⁵ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

5. The appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act is as follows:

All full time and regular part time employees employed by the Employer in the Shop, Technical Services and Event Staff departments of its Moonachie, New Jersey facility, including shop technicians, shop foreman, lead technicians, technical services technicians and technical services supervisor, event staff technicians and event staff programmers, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

II. FACTS

A. Operational Overview

The Employer is in the business of providing automated lighting services for theatrical performances. The Employer specializes in Vari-Lite lighting systems that are moved and controlled from a programmable computerized console. The Employer's clients are primarily Broadway shows in New York City. However, the Employer also works on off-Broadway shows, trade shows, touring events and special events, such as the 2005 Super Bowl half-time show and 2004 Athens Summer Olympics. The Employer has facilities around the country and internationally, including its facility in Moonachie, New Jersey.

Richard McDonald is the Operations Manager of the Moonache facility. Shop Foreman Chris Reising,⁶ Technical Services Supervisor Gary Lewis and the five Event Staff technicians report directly to McDonald. Lead Shop Technician Nuno

⁶ Reising was referred to on the record interchangeably as Shop Foreman and Shop Supervisor.

Periera reports to Reising.⁷ The Petitioner seeks to include Lewis, Reising, Periera and the Event Staff technicians in the unit.⁸

McDonald works within a broader managerial hierarchy and attends management meetings at the Employer's North Bergen, New Jersey facility. Department supervisors Lewis and Reising do not attend these managerial meetings. However, McDonald does occasionally meet with his department supervisors regarding new policies that they in turn communicate to the staff.

The facility has a single shop floor which is partitioned from an adjoining suite of offices through a door. McDonald, Lewis, Reising and Periera each have an office.⁹ The shop floor has one caged area where certain parts are maintained. Although not otherwise divided physically, the shop floor has separate areas designated for certain tasks. Generally, Field Technician Scott Werner¹⁰ works in the parts cage repairing circuit boards while Lewis and the other Field Technician work next to the cage. However, all employees have free access to the entire shop to work with equipment and to interact casually or as their jobs require. The facility also has a lunchroom that is used by everyone and a time clock that is punched by all hourly employees.

⁷ The Lead Shop Technician is a new position that was created just two days before the hearing herein.

⁸ The parties stipulated, and I find, that McDonald is a supervisor as defined by the Act and should be excluded from the unit. The record reflects that McDonald has supervisory authority to hire, fire and discipline employees on behalf of the Employer using independent judgment.

⁹ A receptionist also works in the office area.

¹⁰ Werner is also referred to as the Bench Tech.

Although he has a separate office, McDonald testified that he walks through the shop floor at least four times each day to insure that everyone is "in sync." The Employer also circulates among the Moonachie facility's personnel a "What's Going On" form that lists the various due dates and lighting requirements of each lighting rental package, which will be described below.

All individuals employed out of the Moonachie facility have the same medical and pension benefits. The Shop Technicians, Field Technicians and Shop Foreman are paid an hourly rate plus time and a half for overtime above 40 hours per week. Shop Technicians earn \$12.50 to \$16 per hour and Field Technicians earn \$18 to \$25 per hour. The Technical Services Supervisor and Lead Shop Technician are paid a salary without overtime.¹¹ Pay raises for staff are requested by McDonald from upper management.

All hourly employees accrue paid leave at a common rate that is determined by their length of service. Lewis and Periera accrue sick leave at a faster rate than the hourly staff.¹² McDonald resolves any leave conflicts among employees that cannot be corrected voluntarily by the employees and their department supervisors. Event Staff do not receive paid time off from work. Rather, they receive a bonus in lieu of paid leave for every 20 days they work at an event in the field.

¹¹ The record does not reflect the hourly rate of Reising or the salaries of Lewis and Periera. McDonald merely testified that Lewis earns more than the two Field Technicians.

¹² Lewis and Periera accrue five sick days per year while hourly employees accrue two per year.

B. The Shop

The Shop is primarily responsible for preparing rental lighting packages for shipment to client venues and storing them upon their return to the facility. This work includes obtaining from storage and Technical Services the lights, cables, accessories and other equipment that have been ordered by clients; preparing, cleaning, testing, servicing and packaging those materials; loading them on and off trucks; tracking incoming and outgoing inventory through a bar code computer system; and re-packaging, stacking and storing those materials upon their return.

Although Shop Technicians prepare and service lights and equipment for use, they do not repair circuit cards at the component level or work on consoles. If a Shop Technician cannot fix a light or a piece of equipment, he or she will exchange it with Technical Services for one that works. Technical Services then repairs the defective piece. McDonald testified that Shop Technicians exchange materials with Technical Services in this manner several times each day.¹³ Shop Technicians also place weekly orders with Technical Services for certain lights and equipment they need for upcoming projects.

The Shop Foreman assigns Shop Technicians their work. In this regard, Reising assigns each Shop Technician the responsibility for preparing a portion of a rental package. For example, Reising may assign a Shop Technician to test, service, package and scan out of inventory 100 lights of a particular kind for shipment as part

¹³ Shop Technicians give faulty equipment to Lewis if he is in the facility or to a Field Technician if Lewis is out. According to McDonald, Lewis receives about 50% and the Field Technicians receive about 50% of such materials from the Shop Technicians.

of a larger rental package. Reising allocates labor based on the respective due dates of the Employer's projects, giving higher priority and assigning more labor to orders that are most imminent. The record contains no evidence that Reising assigns work based on the relative skills or experience of Shop Technicians or that he assigns tasks to Shop Technicians that they do not regularly perform or that fall outside their job description.¹⁴

Reising also performs a certain amount of hands-on work with the Shop Technicians. Reising is personally responsible for loading rental packages onto trucks for delivery, unloading supply trucks and checking materials in and out of the inventory. Reising may assign available Shop Technicians to assist him with this work, always mindful of the due dates of other projects. For outgoing rental packages, Reising must insure that the rental order has been filled correctly and direct employees to load the truck in a manner that will insure that all the materials fit. In addition to this work on the loading dock, Reising assigns himself small projects to assist in preparing rental projects for delivery.¹⁵

Lead Shop Technician Periera is primarily responsible for distributing parts to the Shop Technicians and using his expertise to help correct technical problems. McDonald testified that this includes "directing traffic on problems" and the direction of shop technicians in a repair or a process. McDonald also testified that each

¹⁴ The job description for Shop Technician was introduced into evidence as Employer Exhibit 6.

¹⁵ McDonald testified that Reising spends less than 20% of his time assisting Shop Technicians with rental projects. The record evidence does not indicate what percentage of time Reising spends loading trucks himself or with Shop Technicians.

individual light has between 12 and 30 pieces of glass that must be inserted in a different order by the Shop Technicians and that Periera is responsible for tracking and distributing those pieces to the Shop Technicians.

The Shop department staff works from 8:00 a.m. to 4:30 p.m. with a regular lunch break from 12:30 p.m. to 1:00 p.m. Reising calls the lunch break at the appropriate time. McDonald testified that the Employer attempts to hire Shop Technicians with a degree in theatre or electronics and some prior experience in the industry. The Shop Technician job description requires "Tech Level 1" training and entry level experience working with Vari-Lite equipment. Shop Technicians also receive in-house training on the maintenance of various types of lights that the Employer rents.

C. Technical Services

Technical Services is responsible for maintaining and preparing the more complicated electronic devices of the lighting system for delivery to clients. These devices include the console and luminar circuit cards. The console is the brain or nerve center of the lighting system that plugs into it. Technical Services insures that each console has the proper software. Its employees run several diagnostic tests before shipping the console to a client.

Technical Services is also responsible for customer service. Lewis or a Field Technician must be available to take service calls from customers or Event Staff working at client venues from 8:00 a.m. to 6:00 p.m., during which they attempt to correct problems over the phone. However, if the problem persists, Lewis will assign himself or a Field Technician to repair or replace the malfunctioning part in the

field.¹⁶ The record contains no evidence that Lewis assigns tasks to Field Technicians that they do not regularly perform or that fall outside their job description.¹⁷

Lewis is responsible for ordering supplies for the Employer's Moonachie facility. McDonald pre-approves only extremely expensive orders. However, Lewis does not change suppliers or negotiate with suppliers over payment. In many instances, the materials he orders can only be obtained from one source and, even when that is not the case, the Employer's purchasing agent is responsible for making supplier and payment decisions.

Technical Services is also responsible for tracking ongoing problems with products the Employer rents to customers in order to ensure quality control.

Since Lewis or a Field Technician must be available to take customer service calls from 8:00 a.m. to 6:00 p.m., they rotate their daily hours to cover lunchtime between 12:30 p.m. or 1:00 p.m. Otherwise, Technical Services generally breaks for lunch at the same time as the Shop. Lewis and the Field Technicians arrange this rotation among themselves. Although Field Technicians perform repairs in the field, McDonald testified that Field Technician Werner primarily works on circuit boards in the shop cage and Field Technician Keen spends about 90% of his time in the facility.

¹⁶ If a customer can install replacement materials itself, Lewis will assign himself or a Field Technician to pull and ship those materials. Large Broadway shows often require weekly replacements of lights and equipment due to wear-and-tear.

¹⁷ The Field Technician job description was introduced into evidence as Employer Exhibit 7.

McDonald testified that the Employer attempts to hire Field Technicians with training similar to Shop Technicians, but with an emphasis on their background in servicing electronic equipment. The Field Technicians' job description states that such employees must have four years of related engineering experience with a minimum of 2 years of service oriented experience. Once hired, Field Technicians receive formal and on the job training in the operation of consoles. Field Technicians are technically capable of performing Shop Technician work and McDonald estimated that Field Technicians assist in the Shop about once every two months.

D. Event Staff

In addition to the lighting systems that the Employer rents, it also offers Event Staff to transport and install the rental packages at client venues. Clients generally request Event Staff for large shows. The Employer employs five Event Staff technicians: Dale Polansky, Matt Hudson, Chris Conti, Adam Kuhn and Matt Geneckzo. Event Staff technicians work as programmers, lead technicians or regular event technicians, depending upon the show. Polansky is a senior programmer who works only in that capacity. Hudson works as a programmer and a technician. Conti, Kuhn and Geneckzo work only as technicians. McDonald determines which Event Staff technician(s) will work on each show. All five Event Staff technicians worked for the Employer as Shop Technicians before they were promoted to Event Staff, and Geneckzo was promoted to Event Staff from Shop Foreman. Conti testified that it is standard in the industry for shop technicians to advance to Event Staff.

Event Staff employed by the Employer generally direct and supervise a crew of employees employed by the venue, which crew normally consists of stagehands

and electricians. The Employer introduced into evidence a standard customer contract that states in part:

Each member of the [Event] staff will be considered a “supervisor”, as that term is defined by Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11), and no member of the Staff shall perform work that is performed, or has historically been performed, by union workers. The work to be performed by the Staff will be “supervisory,” including the use of personal judgment and discretion to act in the interest of [the Employer]. The staff shall have authority to hire, transfer, suspend, layoff, recall, discharge, assign, reward or discipline workers assigned to the Production, subject to the Producer’s approval.¹⁸

As the title suggests, Event Staff programmers are responsible for programming the console in a manner that causes the lights to move and to perform other functions, as envisioned by the show's lighting designer. Thus, programmers spend a great deal of their time working with the lighting designer and the client’s console operator. The programmers also direct the crew in the safe and proper installation of the console, which is an extremely expensive piece of equipment.

When a show requires more than one Event Staff technician, a lead technician is assigned to coordinate the Employer’s operation at the event.¹⁹ Thus, the lead technician is responsible for preparing a plan that defines the tasks to be performed and the equipment that will be needed to implement each element of the lighting design. The lead technician generally reduces this plan to writing and assigns responsibility for a portion of it to each regular technician. The regular technicians then work out the details and use a portion of the venue's crew to complete their

¹⁸ McDonald testified that crews on Broadway are unionized while off-Broadway crews are not.

¹⁹ Conti testified that, as a rule of thumb, one Event Staff technician is required for every 70 lights to be hung.

respective projects. Such projects include supervising and directing the loading and unloading of trucks and the proper placement of equipment; adapting the lighting system to the individual performance space and production; insuring that all lights and equipment are accounted for; supervising and directing the safe and proper installation and operation of those materials; and fixing parts that are malfunctioning, with or without the assistance of Technical Services.

In addition to the work they perform at the event site, Event Staff technicians perform a certain amount of work in the shop to prepare for their assigned productions. Event Staff technicians may also be assigned by McDonald to assist in the facility between events, as they are needed. Conti testified that Event Staff must have a broad general knowledge of the lights and equipment and are qualified to work in the Shop or Technical Services departments. Thus, Conti not only assists in the Shop, but has filled in for Lewis on occasion. Although Kuhn²⁰ and Polansky do not work in the shop at all, Hudson and Conti work in the shop about 10% and 20% of the time, respectively, and Geneczko works in the shop about 80% of the time.²¹ Event Staff technicians receive their assignments from Reising when they assist in the Shop and they receive an hourly wage within the range of other Shop Technicians.²²

Conversely, although it is extremely rare, Shop Technicians have worked on events when no other Event Staff technicians were available.

²⁰ Kuhn resides in Chicago, not New Jersey.

²¹ Conti testified that employees in the Shop, such as Geneczko, gradually work their way onto the Event Staff as clients become increasingly familiar with their work in the field.

McDonald and Conti testified that Event Staff technicians do not work exclusively for the Moonachie office. Rather, Event Staff technicians who work out of the Moonachie facility work on projects that are supplied and produced by other offices about 50% of the time and on Moonachie projects about 50% of the time.²³

Event Staff are paid a daily rate based on 10 hours of work plus time and a half for overtime above 10 hours and double time for overtime above 20 hours. Polansky and Hudson earn a base daily rate of \$480 and \$440 for programming, respectively. The base daily rate for lead technician and regular technician are \$360 and \$320, respectively. The Event Staff technicians complete a payroll time sheet that they first submit to the client for review and signature before they are paid.²⁴ The schedule and hours of Event Staff tend to be irregular because they vary depending upon the demands of each production. Conti and McDonald testified that Event Staff may be required to work weeks or even months in a row without a day off and at all hours of the day and/or night. However, Conti testified that the average event assignment lasts 6 or 7 days.

McDonald testified that Event Staff technicians utilize as a base of knowledge their training and experience as Shop Technicians and that they receive some formal training once they become Event Staff technicians. For example, Event Staff

²² Conti testified that he is paid \$15 per hour when he works in the Shop department.

²³ For example, Conti worked for three straight months on the 2004 Athens Summer Olympics, which was produced out of the Employer's London office.

²⁴ The record does not indicate whether Event Staff technicians punch the time clock when they work at the facility in between events.

technicians receive training in climbing (for safely hanging lights) and other safety procedures. Conti testified that Event Staff technicians must also learn to fix electronic equipment in the field and develop creative solutions to solve unique problems that are presented by different lighting designs and venues.

E. Department Supervisors' Involvement in Personnel Decisions

McDonald testified that Lewis and Reising take part in the hiring process. McDonald conducts an initial screening and interview of applicants and narrows them down to two or three final candidates. McDonald will then call the appropriate department supervisor into the last interview of the final applicants to introduce them and review the responsibilities of the position. Once the interviews have been completed, McDonald solicits the department supervisor's opinion regarding the applicants and makes a decision whom to hire. McDonald testified that the supervisors' opinion carries a lot of weight.²⁵

McDonald also testified that department supervisors play a role in the Employer's disciplinary process. Thus, a department supervisor may talk to employees regarding misconduct or performance problems and attempt to correct the problem verbally. However, McDonald must be consulted before discipline is issued to an employee in writing and placed "on the record."²⁶ The Employer introduced into evidence a standard Employee Warning Notice used at the Moonachie facility for employee discipline. McDonald testified that department supervisors are authorized

²⁵ McDonald testified that he gives the recommendations of Lewis at "least 50%" weight.

²⁶ McDonald testified that even oral warnings that are memorialized for the record must involve him.

to complete the portion of the warning notice that describes an employee's misconduct or poor performance before submitting it to him (McDonald). Once he is notified of a disciplinary problem, McDonald will discuss the matter with the employee involved and look into the matter as necessary. McDonald may then discuss the appropriate course of action with the supervisor to determine the discipline to be administered (i.e., warning, probation, suspension, discharge, etc.) and add the action to be taken to the warning notice, along with the consequences of future misconduct. The employee and department supervisor may then be asked to sign and date the notice.²⁷

According to McDonald, the Employer maintains a "three strikes and you're out policy" of discharging an employee upon receipt of a third written warning. Therefore, he said, a department supervisor may be involved in the discharge of an employee by reporting an employee's third instance of misconduct.

To date, Reising has not been involved in the formal disciplinary process. Geneczko was involved in the written discipline of one employee for absenteeism during his tenure as Shop Foreman.²⁸ Lewis has been involved in the written discipline of four or five employees during the past four and half years. On those occasions, Lewis has written a description of the employees' misconduct on the warning notice and signed it.

McDonald testified that Lewis and Reising are also involved in the annual evaluations of employees. McDonald completes the evaluations of Shop Technicians

²⁷ The department supervisor may sign the warning notice on the line for "signature of supervisor who issued warning."

²⁸ McDonald could not clearly recall whether, on that occasion, Geneczko wrote anything on the warning notice that was issued to the employee.

and has Reising review them for errors before they are issued. Lewis completes first drafts of the Field Technicians' evaluations and submits them to McDonald for review and editing. Once the evaluations are complete, McDonald and the appropriate department supervisor meet with the employee to discuss them. McDonald testified that employee evaluations are not used to determine merit wage raises or other changes in employee compensation or benefits.

III. Analysis

A. Supervisory Issues

The Employer contends that the Technical Services Supervisor, the Shop Foreman, the Lead Shop Technician and all the Event Staff technicians are supervisors within the meaning of the Act.

Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.²⁹

As the Board has noted in numerous cases, the statutory indicia outlined in Section 2(11) are listed in the disjunctive; only one need exist to confer supervisory status on an individual. See, e.g., *Phelps Community Medical Center*, 295 NLRB

²⁹ Section 2(11) of the Act sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if they hold the authority to engage in any of the 12 listed supervisory functions; their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and their authority is exercised "in the interest of the

486, 489 (1989); *Ohio River Co.*, 303 NLRB 696, 713 (1991); *Opelika Foundry*, 281 NLRB 897, 899 (1986); *Groves Truck & Trailer*, 281 NLRB 1194, n. 1 (1986). However, mere possession of one of the statutory indicia is not sufficient to confer statutory status unless such power is exercised with independent judgment and not in a routine or clerical manner. *Hydro Conduit Corporation*, 254 NLRB 433, 437 (1981). In *Providence Hospital*, 320 NLRB 717, 725 (1996), the Board held, "In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" *Id.* at 724, citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)). The Supreme Court has stated: "Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of ... judgment or discretion ... as would warrant a finding' of supervisory status under the Act." *Id.* (citing *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949)).

The legislative history instructs the Board not to construe supervisory status too broadly, because an employee who is deemed a supervisor loses the protection of the Act. See *Providence Hospital*, *supra*, 320 NLRB at 725; *Warner Co. v. NLRB*, 365 F. 2d 435, 437 (3rd Cir. 1966), cited in *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1073 (1985). The burden of proving that an individual is a statutory supervisor rests with the party asserting it. *NLRB v. Kentucky River Community Care*,

employer." *NLRB v. Kentucky River Community Care, Inc., et al.*, 532 U.S. 706, 713 (2001).

Inc., 121 S. Ct. 1861, 1863 (2001). Absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quadres Environmental Co.*, 308 NLRB 101, 102 (1992) (citing *Sears Roebuck & Co.*, 304 NLRB 193 (1991)). It is well established that an employee's title or a job description setting forth supervisory authority are not determinative of supervisory status for purposes of the Act. *John N. Hansen Co.*, 293 NLRB 63 (1989); *Waterbed World*, 286 NLRB 425 (1987); *Bakersfield Californian*, 316 NLRB 1211 (1995); *Connecticut Light & Power Co.*, 121 NLRB 768, 770 (1958). Further, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. *The Door*, 297 NLRB 601 (1990) (quoting *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)).

(1) **Department Supervisors and the Lead Shop Technician**

The Employer claims that the Technical Services Supervisor and Shop Foreman should be excluded as supervisors because they have the authority to discipline and discharge employees or to effectively recommend such action. However, when a department supervisor observes employees engaging in misconduct or substandard performance that they cannot correct verbally without the use of formal written discipline, they must report these problems to and seek assistance from McDonald, who ultimately decides what to do. See *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998) (warnings that do not affect employee's status are not evidence of supervisory authority). Although, on rare occasions, Lewis has submitted to McDonald a partially completed warning notice describing the employee misconduct at issue, McDonald has then talked to the employee involved and otherwise investigated the matter before determining the disciplinary action to be taken.³⁰ I find this limited and occasional exercise of authority is more of a reporting than disciplinary function, not sufficient to establish that department supervisors are supervisors under the Act. See *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001) (to confer supervisory status, disciplinary authority must lead to personnel action without the independent investigation or review of management).

The Employer also claims that the department supervisors, particularly Lewis, should be excluded as supervisors because of their involvement in the evaluation of employees. However, Section 2(11) does not include "evaluate" in its enumeration of

³⁰ Reising has never been involved in the formal disciplinary process.

supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. See *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999). Here, the record revealed no evidence that evaluations have any such impact on the wages, benefits or job status of employees. Thus, I find that any involvement by Lewis and Reising in the evaluations of employees is not sufficient to establish that they are supervisors under the Act.

The Employer claims that department supervisors should be excluded because they effectively recommend employees for hire. However, the evidence indicates that McDonald is responsible for and conducts an extensive hiring process, with only limited involvement by Lewis and Reising. Thus, McDonald conducts all the initial interviews and screening of employment applicants and only calls the department supervisor in at the conclusion of the last interview of final applicants to review the specific responsibilities of the position being filled. Although McDonald solicits the department supervisors' opinions of the applicants with whom they have met, McDonald does not rely solely on those recommendations in making his final decision as to whom to hire. See *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998); *Waverly-Ceder Falls Health Care*, 297 NLRB 390, 392 (1989); *Passavant Health Center*, 284 NLRB 887, 891 (1987). Thus, I find that the role that the department supervisors play in hiring is not sufficient to establish that they are supervisors under the Act.

The Employer next claims that the department supervisors exercise sufficient authority to assign or responsibly direct employees to justify excluding them as

statutory supervisors. The direction or assignments at issue here are to perform specific tasks and projects and do not involve or have an impact upon employees' overall job responsibilities. Whether such "assignments" are denoted by the statutory term "assignment," as opposed to the term "responsibly to direct" is not clear. See *Providence Hospital*, above, 320 NLRB at 727. However, under either statutory phrase, the assignments at issue here are not characteristic of those of "supervisors who share management's power or have some relationship or identification with management," but rather are similar to those of "skilled nonsupervisory employees whose direction of other employees reflects their superior training, experience or skills." See *id.* at 729. The Board in *Providence Hospital* quoted with approval the court in *NLRB v. Security Guard Service*, 384 F. 2d 143, 151(5th Cir. 1967):

If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

The tasks to which department supervisors assign employees, such as gathering and repairing equipment or loading and unloading trucks, are routine. There was no showing that department supervisors use independent judgment to select among employees. See *Clark Machine Corp.*, 308 NLRB 555, (1992) (assignments are routine when based on employees' skills that are well known). Nor was there any evidence that it was necessary to resolve conflicts or problems with respect to the tasks to be performed or the skills or strengths of the employees. Also, the record reflects that the employees involved generally know what tasks they are to perform and how to do them and, therefore, need little, if any, direction in the projects they are

assigned. Thus, I find that the Employer has not established that the individuals in question assign or responsibly direct employees so as to be excluded from the unit as supervisors on that basis. See *Artcraft Displays, Inc.*, 262 NLRB 1233 (1982).

The Employer introduced little direct evidence regarding the alleged supervisory authority of Lead Shop Technician Periera. As of the hearing date, two days after the position was created, Periera had spent most of his time distributing parts to Shop Technicians. The facts adduced at the hearing made clear that Periera does not hire, fire or assign employees their work. McDonald testified only that Periera may "direct traffic" and direct Shop Technicians in processes to address technical problems. Like the department supervisors, there was no showing that Periera utilizes independent judgment in performing this work. Absent detailed and specific evidence of independent judgment, mere inference or conclusionary statements, without supporting evidence, are insufficient to support supervisory status. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *Sears Roebuck & Co.*, above.

Finally, the context in which Lewis, Reising and Periera work is suggestive of their status as employees rather than supervisors. In this regard, if McDonald is found to be the only supervisor at the Moonachie facility, the ratio of supervisor to employees is 14 to 1 - not uncommonly high. However, if the department supervisors and Lead Shop Technician are found to be supervisors under the Act, as the Employer contends, the ratio of supervisors to employees in the Shop and Technical Services departments falls to an inordinately low level of 2 to 1. See *Wilson Tree Company, Inc.*, 312 NLRB 883, 893 (1993) (supervisory ratio of 14 to 1 falls within Board parameters, while 4 to 1 ratio is inordinately low). Indeed, the evidence indicates that

Lewis, Reising and Periera spend a large portion of their time performing hands on work that is standard among Field Technicians and Shop Technicians, respectively.

Accordingly, based upon the foregoing and the record as a whole, I find that the Technical Services Supervisor, the Shop Foreman and the Lead Shop Technicians are not supervisors as defined by the Act and I shall include them in the petitioned-for unit.

(2) Event Staff Supervisory Status

The Employer claims that Event Staff technicians should be excluded from the unit because they have authority to assign or responsibly direct the venue crews and each other in their work. However, with respect to venue crews, it is well established that “an individual must exercise supervisory authority over employees of the employer at issue, and not employees of another employer, in order to qualify as a supervisor under Section 2(11) of the Act.” *Crenulated Company, Ltd.*, 308 NLRB 1216 (1992). Thus, Event Staff technicians are not supervisors by virtue of any authority they exercise over stagehands, electricians and any other employees employed by their clients, notwithstanding any agreement between the Employer and their clients to the contrary. *Crenulated Company, Ltd.*, above.

Further, Event Staff technicians are not supervisors because they rotate as lead technician and, as a consequence, assign work to each other in that capacity. Like the department supervisors, the tasks that Event Staff assign each other, such as responsibility for loading and unloading trucks, handling lights and installing equipment, are routine. There was no showing that independent judgment is required to select among employees or that it is necessary to resolve conflicts or problems with

respect to the tasks to be performed or the skills or strengths of the employees. The record also reflects that Event Staff know how to perform their respective projects and are responsible for handling the details thereof with little or no direction. Thus, I find that the Employer has not established that the individuals in question assign or responsibly direct employees so as to be excluded from the unit as supervisors on that basis. See *Artcraft Displays, Inc.*, 262 NLRB 1233 (1982).

In reaching this conclusion, I am mindful that Event Staff must exhibit significant creativity and use their extensive training and experience to make important judgments to implement the client's lighting design. However, at issue is not the technical and creative discretion of lead technicians with regard to the lighting plan, but their discretion and independent judgment in directing other technicians in the performance of their work. Here, once the lead technician works out a game plan for implementing the lighting design, he thereafter uses minimal judgment in assigning responsibility for each portion of the plan to the other technicians working the event.

Accordingly, based upon the foregoing and the record as a whole, I find that the Event Staff technicians and programmers are not supervisors as defined by the Act and I shall include them in the petitioned-for unit.

B. Community of Interest

The Employer contends that the petitioned for unit of all employees in the Shop, Technical Services and Event Staff departments is not appropriate and that the largest appropriate units are department-wide. To the contrary, I find that the petitioned-for employees share a sufficient community of interest to warrant a finding that the sought-after unit is appropriate.

It is well established that the Act requires only that a petitioner seek an appropriate unit and not the most appropriate or comprehensive unit. See *Morand Brothers Beverage Co.* 91 NLRB 409 (1950), enfd. 190 F. 2d 576 (7th Cir. 1950); *Capital Bakers*, 168 NLRB 904 (1967). In deciding an appropriate unit, the Board first considers the union's petition and whether the unit sought is appropriate. *Overnite Transportation Company*, 322 NLRB 723 (1966). A petitioner's desire concerning the composition of the unit that it seeks to represent constitutes a relevant consideration. *Marks Oxygen Company of Alabama*, 147 NLRB 228 (1964).

In arriving at an appropriate unit determination, the Board weighs "various community of interest factors" including:

"[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and time spent away from the employment or plant situs under State or Federal regulations; the infrequency or lack of contact, with other employees; lack of integration with work functions of other employees or interchange with them; and the history of bargaining." *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

In the instant case, the evidence reveals that there is a high degree of functional integration. Shop Technicians and Technical Services department employees

exchange parts several times each day and Technical Services department employees track ongoing problems with those materials to insure quality control. Event Staff technicians are responsible for transporting and installing rental packages prepared by Shop Technicians and Technical Services department employees for use at client venues and consult and receive replacement parts from Technical Services for repairs in the field. Thus, the Employer provides its product to clients by an integrated process that involves employees of all three departments and the work of employees in each department depends upon the other two.

Most of the petitioned-for employees have a significant degree of contact by virtue of their work related interaction and close physical proximity in the shop. Shop and Technical Services department employees work primarily on an open shop floor and take lunch together in the same lunchroom. Although Event Staff technicians other than Geneczko spend most or all of their time away from the facility, the Board has held that such remote employees may be included in plant-wide units where the petitioner seeks to represent them and no other union seeks to represent them separately. See *Marks Oxygen Co.*, 147 NLRB 228 (1964) (truck drivers have community of interest with production and maintenance, even though they are away from the plant most or all of the time). All hourly employees also punch the same time clock.

The record evidence further reveals significant employee interchange. McDonald may assign Event Staff technicians to assist in the facility as needed, between projects; when Event Staff fill in as Shop Technicians, they receive their assignments from the Shop Foreman and are paid an hourly rate in the range of other

Shop Technicians. Conti also testified that he has filled in for Lewis. And although it is rare, Field Technicians are occasionally asked to assist in the Shop Department and Shop Technicians have occasionally worked with Event Staff in the field. Further, all Event Staff technicians worked for the Employer as Shop Technicians before they were promoted to their current positions.

The petitioned-for employees also share a degree of common supervision. McDonald walks through the shop at least four times each day to insure everyone is in sync. Further, McDonald is the person primarily responsible for personnel actions at the Employer's Moonachie facility, including hiring, firing, discipline, scheduling and evaluations.

Although the evidence reveals certain inter-departmental disparities between employees in their terms of employment, such as wages, hours and benefits, a close examination of the evidence reveals that those differences are not so dramatic as to undermine their community of interests. Shop Technicians, the Shop Foreman and the Field Technicians are paid on an hourly basis, plus overtime, and receive the same benefits. The record did not reveal a vast difference in compensation between employees in the Shop and Technical Services or between hourly employees and those who are salaried. I recognize that Event Staff earn more and receive their compensation on a different basis than the other two departments. However, since Event Staff technicians are paid hourly for their work in the shop between projects and many Shop Technicians generally aspire to be and may, like Geneczko, gradually become Event Staff Technicians, employees in those two classifications have an

interest in the wages of both departments and, at times, earn Shop Technicians and Event Staff wages simultaneously.

Similarly, the skills and qualifications of petitioned-for employees overlap. Event Staff technicians develop a base of skills and knowledge working as Shop Technicians and, like Technical Services department employees, they must have some facility repairing lights and equipment away from the shop at events. Further, although Technical Services is responsible for major repairs and working with the more complicated electronic equipment, Shop Technicians may attempt to service lights and equipment before exchanging them for working parts.

In conclusion, the evidence establishes that the Shop, Technical Services and Event Staff department employees share a community of interest. In so finding, I particularly rely on the fact that the work performed by all of these employees is functionally integrated, that there is frequent working contact among them, significant employee interchange and a commonality of supervision. Accordingly, I find that the petitioned-for unit is appropriate and shall direct an election therein.

IV. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained

their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, LOCAL 632.**

V. LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible

voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **February 11, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **February 18, 2005**.

Signed at Newark, New Jersey this 4th day of February 2005.

/s/ Gary T. Kendellen

Gary T. Kendellen, Regional Director
NLRB Region 22
20 Washington Place
Fifth Floor
Newark, New Jersey 07102